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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

TONI BASIL,

Plaintiff and Appellant,

v.

NEW RAZOR & TIE
ENTERPRISES, LLC et al.,

Defendants and
Respondents.

B299985

(Los Angeles County
Super. Ct. No. BC674401)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Fem Law Group, and F. Edie Mermelstein for Plaintiff and Appellant.

Law Offices of Robert S. Besser, and Robert S. Besser for Defendants and Respondents.

* * * * *

Toni Basil (aka Antonia Basilotta) is “widely recognized as a one[-]hit wonder for her” 1980’s anthem *Mickey*. In this lawsuit, she has sued several related entities for licensing the song and music video for *Mickey* without her permission. The trial court dismissed the lawsuit on its pleadings on the ground that it was preempted by the federal Copyright Act (17 U.S.C. § 101 *et seq.*). This ruling was correct, so we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts¹

A. *Mickey*

The song *Mickey* is a “one[-]hit wonder” from the early 1980s and its cheerleading-themed music video continues to be a “cheerleading anthem” today. As the singer of *Mickey*, plaintiff Toni Basil’s (Basil) “brand and identity [are] intertwined with” *Mickey*.

B. *Initial rights to Mickey*

In 1979 and again in 1982, Basil signed contracts with Radialchoice to serve as her record label. Under these contracts, Radialchoice agreed that it could license any of Basil’s “master recordings” to third parties only with her written consent.

In 1985, Radialchoice was “involuntarily forced into liquidation.” Radialchoice “officially dissolved” in 1988.

C. *Post-liquidation rights to Mickey*

In 1994 and 1997, a cluster of related companies all with the words “Razor & Tie” in their names² (collectively, defendants)

¹ These facts are drawn from the operative, First Amended Complaint.

² These companies are New Razor & Tie Enterprises, LLC; Razor & Tie Direct, LLC; Razor & Tie Entertainment, LLC;

purported to purchase the rights to license *Mickey* from a Panama-based company called Odel Finance Corporation. In 1998, defendants signed a “letter [agreement]” with the “purported successor in interest” to Radialchoice, a company called Twist & Shout, regarding the right to license *Mickey*.³ On the basis of this chain of title to the rights to *Mickey*, defendants told “third parties” that (1) Basil was “their ‘client,’” and (2) they “were rights holders with the ability to license *Mickey* and the related assets, and [to] consent to the use of Basil’s marks, voice, name, likeness, and persona.” Defendants then licensed *Mickey* to third parties (including to the TV show *South Park*), and collected the revenue stream from those licenses without remitting any money to Basil.

At the time defendants entered into these licensing deals, they “knew or should have known” that their chain of title “was defective.” That is because, under Basil’s contracts with Radialchoice, the rights to *Mickey* reverted to her upon Radialchoice’s involuntary liquidation. Thus, defendants’ statements to the third parties that they had the lawful right to license *Mickey* were “fraudulent[].”

Razor & Tie Music, L.P.; Razor & Tie Music Corp.; and Razor & Tie Recordings, LLC.

³ Basil’s allegations in this regard are a bit confusing because she elsewhere alleges that the “purported successor in interest” to Radialchoice is a company called Stillwater, Limited. These potential inconsistencies are not material to our resolution of the issues on appeal.

II. Procedural Background

In October 2017, Basil filed the operative First Amended Complaint against defendants and others.⁴ In this complaint, she sued defendants for (1) intentional interference with a prospective economic advantage (intentional interference), (2) elder abuse, and (3) unfair business practices.⁵

As the basis for her claim for intentional interference, Basil alleged that (1) she had a “prospective economic relationship” with “third parties” who “desir[ed] to license *Mickey* and [Basil’s] publicity rights,” (2) defendants “fraudulently misrepresented” that (a) they were Basil’s agent and (b) “could license *Mickey* and [Basil’s] publicity rights on” her behalf, and (3) through these acts, defendants misappropriated “revenues received as a result of [the] unauthorized third[-]party licensing” and “intentionally interfered with [Basil’s] ability to control her image, while damaging the value of her brand.”

As the basis for her claim for elder abuse, Basil incorporated the above stated allegations and additionally alleged that she was 65 or over.

⁴ Basil also sued Viacom International. Inc., aka VH1 Networks, Central Productions, LLC, Forever 21 Retail, Inc., New Open Door Productions, Inc., Kohl’s, and The Walt Disney Company. However, she voluntarily dismissed these other defendants.

⁵ Basil also alleged a claim for “false designation of origin” under the federal Lanham Act (15 U.S.C., § 1501 *et seq.*), but that claim was dismissed with leave to amend by a federal court, following removal, as being preempted by the Copyright Act. When Basil elected to dismiss that claim rather than amend, the federal court remanded the case back to state court.

As the basis for her claim for unfair competition, Basil incorporated the above stated allegations, and asserted that defendants' conduct was "unlawful" (because it constituted elder abuse) and was "fraudulent" and "unfair" (because defendants "misrepresent[ed] to [third-parties] that [Basil] is their client").

Defendants moved for judgment on the pleadings on the ground that Basil's claims were preempted by the Copyright Act. After a full round of briefing and a hearing, the trial court issued a seven-page order granting the motion.

The court applied a two-part test for evaluating whether a state law claim is preempted by the Copyright Act, which turns on whether (1) the subject of the claim is a copyrighted work, and (2) "the right asserted" through the claim is "equivalent to the exclusive rights contained in" the Copyright Act. The court found that the first part was met because it was "fairly clear" that the "subject" of all three of Basil's claims was "the fact that *Mickey*"—a copyrighted work—"was licensed and published without her consent." The court also found that each of Basil's claims met the second part of the test. "In this factual context," the court reasoned, Basil's intentional interference claim was "qualitatively the same as a copyright violation" because her "interference theory is that [defendants'] unauthorized licensure of *Mickey* prevented [Basil] from licensing *Mickey* to those customers herself," and the right to license a copyrighted work is a right protected by the Copyright Act. The court rejected Basil's arguments that this claim was, at bottom, a "fraud" or "contract" claim because "the fraudulent statements [alleged to have been made by defendants] were not made to" Basil and because "there is no . . . contract between" defendants and Basil. Basil's elder abuse claim rested on the same allegations as her intentional

interference claim, and was not saved from preemption by the additional allegation that Basil was age 65 or over: “Unauthorized licensing is unauthorized licensing, no matter whether the true owner is 25 or 65.” Basil’s unfair competition claim was also preempted “to th[e] extent” it was “derivative” of her intentional interference and elder abuse claims, but *not* preempted “[t]o the extent” it was “based directly and independently on [defendant’s] fraudulent representations to [third parties].” Because Basil’s unfair competition claim was only preempted in part, the court granted defendants’ motion for judgment on the pleadings as to all three claims but granted Basil leave to amend the unfair competition claim.

When Basil filed an election not to amend, the trial court entered judgment for defendants and Basil filed this timely appeal.

DISCUSSION

Basil argues that the trial court erred in granting judgment on the pleadings based on preemption by the Copyright Act. A trial court may grant judgment on the pleadings on the basis of preemption by federal law. (*Kabehie v. Zoland* (2002) 102 Cal.App.4th 513, 517 (*Kabehie*)). Because a court considering a motion for judgment on the pleadings must deem “[a]ll properly pleaded, material facts” in the operative complaint to be “true” (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777 (*Harris*)), and because preemption is a question of law (*Roberts v. United Healthcare Services, Inc.* (2016) 2 Cal.App.5th 132, 141-142), our review of the trial court’s ruling in this case is de novo (*Harris*, at p. 777). Because Basil elected not to amend when granted leave to do so, we need not examine

whether her complaint, if properly dismissed, can be amended. (*Kabehie*, at p. 519.)

I. The Law of Copyright Preemption

The Copyright Act of 1976 (17 U.S.C., § 101 *et seq.*) (the Copyright Act or the Act) creates exclusive federal jurisdiction over “all legal or equitable rights” “equivalent” to those conferred by the Act (*id.*, § 301(a)) while simultaneously preserving the jurisdiction of state courts to adjudicate state-law based claims if the “subject matter” of those claims “does not come within the subject matter of [the Act]” or if the “activities” prohibited by those claims “are not equivalent to any of [the Act’s] exclusive rights” (*id.*, § 301(b)(1), (b)(3)).

In order to walk the fine line between the Act’s complementary preemption and preservation clauses, courts have fashioned a “two-part test to determine whether a state law claim is preempted by the Act.” (*Laws v. Sony Music Entm’t, Inc.* (9th Cir. 2006) 448 F.3d 1134, 1137 (*Laws*)). A state law claim is preempted if both parts of the test are satisfied. (*Ibid.*)

The first part asks: Does “the “subject matter” of the state law claim fall[] within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103?” (*Maloney v. T3Media, Inc.* (9th Cir. 2017) 853 F.3d 1004, 1010 (*Maloney*), quoting *Laws, supra*, 448 F.3d at p. 1137.)

The second part asks: Are “the rights asserted under state law . . . equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders?” (*Maloney, supra*, 853 F.3d at p. 1010, quoting *Laws, supra*, 448 F.3d at p. 1138.) In assessing whether the rights asserted through a state law claim are “equivalent” to the exclusive rights of copyright holders, a court must (1) engage in a “fact-specific

analysis” of the “nature” of the state law claim *as alleged by the plaintiff in that case*; and (2) determine whether that state law claim, as alleged, “protects rights which are qualitatively” the same as “the [exclusive] rights” conferred by the Act. (*Maloney*, at p. 1019; *Laws*, at p. 1139; *Kabehie*, *supra*, 102 Cal.App.4th at pp. 520-521.) If the state law claim has an “extra element” that “changes the nature of the action so that it is *qualitatively different* from a copyright infringement claim,” that claim is not preempted. (*Kabehie*, at pp. 520-521; *Laws*, at p. 1144; *Maloney*, at p. 1019.) When assessing the “nature” of the state law claim, what matters is “the right sued upon and not the form of the action” (See *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1153 [defining inquiry into “nature” of the action, for statute of limitations purposes]); were the rule otherwise, litigants could “nullify[]” the Act’s preemptive effect through “artful pleading” (*Kabehie*, at p. 526; *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 606-607).

II. Analysis

A. Subject matter

In all three of her state law claims, Basil alleges that defendants improperly licensed *Mickey* to third parties and, in so doing, coopted Basil’s “marks, voice, name, likeness, and persona.” Under the Act, a copyright reaches “original works of authorship fixed in any tangible medium of expression,” and includes “musical works,” “motion pictures and other audiovisual works,” and “sound recordings.” (17 U.S.C., § 102(a), (a)(2), (a)(6), (a)(7).) The song and music video for *Mickey* fall within the subject matter of the Act because they constitute a “musical work[],” an “audiovisual work[],” and a “sound recording[].” (17 U.S.C., § 102(a), (a)(2), (a)(6), (a)(7).) Although an allegation that

someone has coopted a plaintiff's likeness or persona *can* be outside the subject matter of the Act (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 373-375 [right of publicity based on misuse of likeness for using a still photograph not preempted because "likenesses . . . are not copyrightable"]; *Timed Out, LLC v. Youabian, Inc.* (2014) 229 Cal.App.4th 1001, 1012-1013 [same, as to persona]), they fall within the Act's subject matter when the plaintiff has not "identif[ied] any use of [her] likeness[] [or persona] independent of the display, reproduction, and distribution of the copyrighted material in which [the plaintiff is] depicted." (*Maloney, supra*, 853 F.3d at pp. 1019, 1011; *Laws, supra*, 448 F.3d at p. 1141 [same].) That is the case here, as plaintiff herself seems to concede when she alleges that her "brand and identity"—that is, her persona and any implied endorsements—"[are] intertwined with her iconic song *Mickey*."

B. *Equivalence of rights*

1. *Intentional interference*

In her claim for intentional interference, Basil alleges that defendants' conduct in licensing *Mickey* and Basil's publicity rights to third parties interfered with *her* prospective right to do so, and consequently interfered with her right to collect the revenue stream from the third parties' use of her copyrighted work. Among other exclusive rights, the Act grants copyright holders the "exclusive right[]" "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending." (17 U.S.C., § 106(3).) This right includes the right to license a copyrighted work to third parties (*Davis v. Blige* (2d Cir. 2007) 505 F.3d 90, 98 (*Davis*); *Nat'l Car Rental Sys. v. Computer Assocs., Int'l.* (8th Cir. 1993) 991 F.2d 426, 432) and to collect the revenue stream from

such licenses (*Am. Geophysical Union v. Texaco Inc.* (2d Cir. 1994) 60 F.3d 913, 929 [“It is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work.”]; *Kabehie, supra*, 102 Cal.App.4th at p. 530 [state law claim for an accounting of revenues from the “unauthorized reproduction and distribution of the [copyrighted] material” is preempted]). Accordingly, the rights Basil is asserting in her intentional interference claim are “equivalent” to the “exclusive rights of copyright holders” under the Act and thus preempted. (*Maloney, supra*, 853 F.3d at p. 1010.) Other cases have come to the same conclusion: A plaintiff’s claim for intentional interference is preempted where, as here, that claim is premised on the defendant’s exploitation of the plaintiff’s copyrighted work in a manner that interferes with the plaintiff’s prospective exploitation. (E.g., *Motown Record Corp. v. George A. Hormel & Co.* (C.D.Cal. 1987) 657 F.Supp. 1236, 1239-1240; *Media.net Adver. FZ-LLC v. NetSeer, Inc.* (N.D.Cal. 2016) 156 F.Supp.3d 1052, 1073-1074 (*Media.net*); *Kabehie*, at p. 530; cf. *Pmc, Inc. v. Saban Entm’t, Inc.* (1996) 45 Cal.App.4th 579, 594, fn. 8 [no preemption of intentional interference claim where “gravamen of the allegations” is that defendant interfered with plaintiff’s ability to finalize deal with third party, *not* that defendant “wrongfully used the copyright”], overruled in part on other grounds as stated in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159.)

2. *Elder abuse*

Basil’s elder abuse claim is based upon the same allegations as her intentional interference claim with one added wrinkle—it is *also* based upon the allegation that Basil is 65 years or older. Because the rights at issue in her intentional

interference claim are “equivalent” to the exclusive rights of copyright holders under the Act, so too are the rights at issue in her elder abuse claim. That the elder abuse claim applies only to persons aged 65 and over does not alter the qualitative nature of those rights; it only narrows the universe of persons who may sue for their violation as elder abuse.

3. *Unfair competition*

Because Basil opted not to take the trial court up on its grant of leave to amend, the only portions of her unfair competition claim at issue are the ones the trial court found to be derivative of her intentional interference and elder abuse claims. In such instances, the unfair competition claim is also preempted. (*Media.net, supra*, 156 F.Supp.3d at pp. 1074-1075 [so noting].)

III. **Basil’s Remaining Arguments**

Basil offers what boil down to two categories of arguments as to why her state law claims are not preempted by the Act.

A. *Incorrect legal analysis*

Basil asserts that the trial court’s legal analysis is defective for three separate reasons.

First, Basil contends that the court erred in ignoring that her state law claims “sound[ed] in fraud, misrepresentation and taking of monies due,” and, worse yet, in disregarding her allegations to that effect. We reject this contention because it is flatly inconsistent with the pertinent test that requires courts to adjudge the “nature” of each state claim *notwithstanding the form of that claim*. To give the form of the claim conclusive effect, as Basil seems to suggest, is to give litigants a blueprint for sidestepping preemption by the Act.

Second, and for the first time in her reply brief, Basil asserts that her state claims involve different rights than a claim

under the Act because none of those claims requires, as an element of proof, a showing of copyright infringement. We reject this assertion because it also uses the wrong test. As noted above, the pertinent test does not turn on the elements of the state law claims in the abstract but rather on a “fact-based analysis” of the nature of those claims as alleged *in this specific case*. (*Maloney, supra*, 853 F.3d at p. 1019; *Kabehie, supra*, 102 Cal.App.4th at pp. 520-521.)

Third, and also for the first time in her reply brief, Basil argues that courts are confined to the “face of the complaint” when assessing whether a claim falls within the scope of federal jurisdiction, and she never pled a copyright claim on the face of her complaint. This argument is not only waived for not being raised in the opening brief (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 799), it is frivolous. The authority Basil cites all deals with the “well-pleaded complaint” rule that governs whether removal to federal court based on federal question jurisdiction is warranted. (*Rivet v. Regions Bank* (1998) 522 U.S. 470, 474-475; *Franchise Tax Bd. v. Constr. Laborers Vacation Trust* (1983) 463 U.S. 1, 10-11, superseded on other grounds by 28 U.S.C., § 1441(e); *Durgom v. Janowiak* (1999) 74 Cal.App.4th 178, 182-183.) This authority uses a different test than the test that governs whether a state law claim is preempted by the Act. We elect to follow the test for preemption that has been applied by federal and California courts for decades.

B. *Non-equivalence of rights at issue*

Basil offers two groups of arguments as to why, in her view, the rights at issue in her state law claims are not equivalent to the exclusive rights underlying the Act.

First, Basil contends that she is asserting non-equivalent rights in her state law claims. Contrary to what the trial court ruled, Basil continues, her claims “do not rest upon [defendants’] reproduction, performance, distribution or display of *Mickey*” but rest instead upon defendants’ acts in (1) “falsely claiming” to be her agent, (2) “collecting money” from licensing *Mickey* to third parties (and the related acts of “funneling” that money “to offshore entities” as well as “retaining” that money “for legal fees neither awarded nor contractually agreed to be paid by” Basil), and (3) coopting Basil’s contractual rights. We reject these contentions. Defendants’ acts in “falsely claiming” to be her agent do not take their underlying conduct in unlawfully licensing *Mickey* outside the scope of preemption because such acts are part and parcel of that licensing: Because defendants are not Basil herself, they would necessarily have to hold themselves out as her agent. Defendants’ acts in collecting money—no matter how it is subsequently used or what they do to conceal it—do not alter the fundamental nature of Basil’s claims or otherwise take defendants’ underlying conduct in unlawfully collecting a revenue stream from an unlawfully copyrighted license outside the scope of preemption. (Accord, 1 Nimmer & Nimmer, Nimmer on Copyright § 1.15[I][3][a] [“absent a relationship between plaintiff and defendant, a claim for conversion of copyright royalties would seem preempted.”].) And Basil’s claims do not rest upon any violation of contract rights that exist or that she has standing to assert. Although a state law claim for breach of a contract for royalties is not preempted by the Act (*Kabehie, supra*, 102 Cal.App.4th at pp. 527-528; see also, *MDY Indus., LLC v. Blizzard Entm’t, Inc.* (9th Cir. 2010) 629 F.3d 928, 957 [“the Copyright Act’s preemption clause

usually does not affect private contracts”)), here there was no contract between Basil and defendants’ licensees or between Basil and defendants. We reject her attempt to shoehorn this case into inapplicable precedent.

Second, and even if her state law claims *do* rest on rights equivalent to those protected by the Act, Basil asserts that each of her claims nevertheless has an “extra element” that precludes preemption: Her interference claim contains an “extra element of misrepresentation”; her elder abuse claim contains the “extra element” of an age requirement; and her unfair competition claim encompasses extra elements, too. We reject these arguments. To begin, these arguments overlook that the only type of “extra element” that prevents preemption by the Act is one that “changes the nature of the action so that it is *qualitatively different* from a copyright infringement claim” (*Kabehie, supra*, 102 Cal.App.4th at pp. 520-521; *Maloney, supra*, 853 F.3d at p. 1019); a plaintiff’s ability to identify extra elements that do *not* change the nature of the rights at issue is irrelevant. The “extra elements” Basil identifies are irrelevant because none of them changes the nature of the rights at issue in her state law claims. Although the Act does not preempt a state law claim “alleging fraud” because “[f]raud involves “the extra element of misrepresentation”” (*Kabehie*, at pp. 529-530; *Gladstone v. Hillel* (1988) 203 Cal.App.3d 977, 987), the only misrepresentations involved in Basil’s intentional interference claim are the misrepresentations defendants made to third parties as the means of accomplishing their interference with Basil’s right to license *Mickey*. Because the harm to Basil in this case arises from that interference, and because that interference is based upon the usurpation of Basil’s exclusive rights under the Act,

defendants’ resort to misrepresentation to effectuate that interference does not “change the nature” of Basil’s interference claim. For the reasons explained above, the age requirement of an elder abuse claim does not alter the nature of the rights underlying that claim. And whether an unfair competition claim might, in the abstract, contain extra elements does not matter because Basil elected to stand on the wholly derivative aspects of her unfair competition claim.

* * *

In light of our analysis, we have no occasion to address Basil’s further argument that the defendants overread the effect of the federal court’s dismissal of her Lanham Act claim.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
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